No. 88-956

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LSLJ PARTNERSHIP,

Petitioner,

vs.

FRITO-LAY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether proof of below incremental cost pricing is required to establish that a defendant with market power in an industry with significant barriers to entry engaging in geographic price discrimination and other non-price conduct for the express purpose of injuring competition has violated § 2 of the Sherman Act or the Robinson-Patman Act?
2. Whether the uncontradicted testimony of an expert witness that defendant priced below long-run incremental cost creates a genuine issue of material fact sufficient to withstand a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure?

PARTIES INVOLVED

Petitioner, LSLJ Partnership, is a partnership composed of the former owners of Jay's Foods, Inc., a manufacturer of snack foods. Jay's Foods, Inc., filed suit against Frito-Lay, Inc. After filing suit, Jay's Foods, Inc., assigned its claims against Respondent, Frito-Lay, Inc., to the LSLJ Company which then assigned to the LSLJ Partnership. LSLJ Partnership has no parents, subsidiaries, or affiliates.

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vs.

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ON PETITION OF LSLJ PARTNERSHIP FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 8, 1988.

OPINIONS BELOW

The Court of Appeals for the Seventh Circuit issued its Order on September 8, 1988. The Order is reproduced in the attached appendix at Appendix pp. 1a-3a. The Judgment of the Seventh Circuit affirming the judgment of the District Court for the Northern District of Illinois is reproduced in the attached appendix at Appendix p. 4a. Several Opinions of the District Court for the Northern District of Illinois gave rise to this appeal. The first Opinion granting summary judgment in favor of Frito-

Lay is reported at 614 F.Supp. 103 and is reproduced in the attached appendix at Appendix pp. 5a-32a. The second Opinion denying Petitioner's Motion for Reconsideration is reported at 635 F.Supp. 103 and is reproduced in the attached appendix at Appendix pp. 33a-37a. The third Opinion is reported at 656 F.Supp. 843 and is reproduced in the attached appendix at Appendix pp. 38a-45a. The fourth Opinion is reported at 664 F.Supp. 364 and is reproduced in the attached appendix at Appendix pp. 46a-62a. The final judgment of the District Court is reproduced in the attached appendix at Appendix p. 63a.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on September 8, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

15 U.S.C. § 2 (The Sherman Act)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

15 U.S.C. § 13(a) (The Robinson-Patman Act)

(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: **Provided**, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: **Provided, however**, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits,

and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: **And provided further**, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: **And provided further**, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolesence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

STATEMENT OF CASE

Plaintiff, LSLJ Partnership, is a partnership comprised of the former owners of Jay's Foods, Inc. Plaintiff manufactures and sells potato chips in Illinois, Wisconsin, Michigan, and Indiana. Appendix p. 6a. Chicago is plaintiff's principal market. Appendix p. 6a.

Defendant, Frito-Lay, Inc., is a national producer of salty snack foods, including potato chips, corn chips, tortilla chips, cheese puffs, and pretzels. Appendix p. 5a. By mid-1978, Frito-Lay had a 55% share of the snack food market in Chicago, while Jay's share of that market was only 24%. Appendix p. 7a fn. 2.

This litigation was brought by Jay's Foods, Inc., a manufacturer of potato chips against Frito-Lay, Inc., for violation of § 2 of the Sherman Act (15 U.S.C. § 2), § 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)), and the Illinois Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. Chap. 121½ §§ 261, *et seq.*). The District Court had jurisdiction over this action under 28 U.S.C. § 1337 and the doctrine of pendent jurisdiction because the federal claims involved § 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act and the state law claims arose from the same conduct.

Seeking both damages and injunctive relief, plaintiff alleged that defendant engaged in anti-competitive and unfair conduct, including predatory pricing, geographic price discrimination, and commercial sabotage, with the effect of lessening or tending to lessen competition in the sale of salty snack foods. Defendant contended that its conduct was not unlawful.

Through a series of summary judgments, the District Court entered judgment in favor of defendant on all counts. On August 1, 1985, the District Court entered

summary judgment on plaintiff's claims under § 2 of the Sherman Act. On March 31, 1986, the District Court denied plaintiff's motion to reconsider. On February 26, 1987, summary judgment against plaintiff's claims under the Robinson-Patman Act was entered. Finally, on February 26, 1987, summary judgment against plaintiff's state law claims was entered. The lower court's rulings and orders are set forth in the Appendix. The Seventh Circuit affirmed and adopted these opinions as its own. Appendix p. 2a.

Sales of snack foods to supermarkets account for over 60% of the total sales of snack foods. Therefore, suppliers, such as Jay's and Frito-Lay, compete for shelf space in supermarkets. Appendix p. 6a. Supermarket sales of potato chips depend upon the amount of shelf space allocated to a supplier. Appendix p. 24a. A snack food supplier needs adequate shelf space to compete. Appendix p. 24a. Too little shelf space creates difficult supply problems requiring frequent restocking. Appendix p. 24a. Inadequate shelf space hinders the ability of snack food suppliers to expand into new product lines. Appendix p. 24a.

The company with the greatest share of potato chip sales controls the entire salty snack food section of the supermarket. Appendix p. 6a. Moreover, potato chip sales are the core of Frito-Lay's regional competitors' strength. Appendix p. 6a-7a. For these reasons, Frito-Lay sought to increase its market share of potato chips. Appendix p. 7a.

During the 1974-1980 period, Jay's sold more potato chips in Chicago than Frito-Lay. Appendix p. 7a. During the same period Jay's sought to expand into the manufacture and sale of other snack food products and to become a supplier of a full range of snack foods. Appendix p. 7a.

Chicago was one of Frito-Lay's problem markets. Frito-Lay faced strong local competition from Jay's in potato chips, and its performance lagged relative to other markets. Appendix p. 8a. For this reason, Frito-Lay offered substantial price discounts in the Chicago market. Appendix p. 8a. Frito-Lay's prices for some potato chip products in the Chicago market were lower for significant periods than prices for the same products in other markets. Appendix p. 9a. Plaintiff's analysis of Frito-Lay's costs, which was uncontroverted, showed that Frito-Lay's total cost of producing potato chips for the Chicago market exceeded its revenues. Appendix p. 21a.

Frito-Lay's scheme of price discrimination was motivated by a desire to hinder aggressive competitive expansion. Appendix p. 27a. Indeed, some Frito-Lay employees attempted to buy extra shelf space and to sabotage supermarket tests of snack food sales in order to obtain more shelf space. Appendix p. 26a. The district court recognized that this evidence corroborated the existence of Frito-Lay's predatory intent. Appendix p. 27a.

On July 11, 1986, Jay's Foods, Inc., assigned its cause of action against Frito-Lay to the LSLJ Company, which was owned by the shareholders of Jay's Foods, Inc. In December, 1986, LSLJ Company assigned this cause of action to LSLJ Partnership which is composed of the former shareholders of Jay's Foods, Inc.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

INTRODUCTION

Defendant, Frito-Lay, is the dominant supplier of salty snack foods in the United States. By contrast, plaintiff manufactured and sold potato chips in a limited market consisting of parts of Illinois, Wisconsin, Indiana, and Michigan. Plaintiff's key market was Chicago. By mid-1978, Frito-Lay had 55% of all snack food sales in Chicago, plaintiff's primary market, compared to plaintiff's 24% share. Appendix p. 7a fn. 2. However, Jay's sold more potato chips in that market. Appendix p. 7a. Frito-Lay sought to maintain its dominant market share by preventing plaintiff from using its strong base of potato chip sales in Chicago for expansion into new product or geographic markets. To achieve this end, Frito-Lay intentionally maintained lower prices on potato chips, the product upon which plaintiff's business depended, in plaintiff's market area.

Frito-Lay coupled this discriminatory pricing scheme with commercial bribery and sabotage in an effort to cripple plaintiff's competitive efforts. Given the barriers to entry existing in the snack food industry, the purpose and effect of Frito-Lay's conduct was to lessen competition and to maintain Frito-Lay's dominant market position.

Plaintiff challenged Frito-Lay's conduct under § 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. Although recognizing that Frito-Lay possessed significant market power, and was motivated by the express purpose of hindering plaintiff's expansion in an industry with significant barriers to entry, the courts below re-

jected plaintiff's claims. Ignoring this non-cost evidence, the lower courts adopted a strict cost test for predatory pricing. The lower courts held that plaintiff was required to prove that Frito-Lay's prices were below incremental cost in order to establish a *prima facie* case of predatory pricing sufficient to withstand a motion for summary judgment.[1]

Focusing solely on the pricing aspects of this case, and improperly ignoring Frito-Lay's non-price related conduct, the Seventh Circuit decided that plaintiff had failed to make out the "outline" of an antitrust violation despite the existence of evidence that (1) Frito-Lay's prices were below its average total costs adjusted for Frito-Lay's cost of capital (Appendix p. 21a); (2) there were barriers to entry created by the need for shelf space (Appendix p. 25a-26a); and (3) Frito-Lay, a firm with market power, acted with predatory intent (Appendix p. 27a). The imposition of a strict cost-based test for predation in these circumstances conflicts with the decisions of this Court and other Courts of Appeal and raises serious questions which need to be resolved.

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[1] Although the Seventh Circuit stated that plaintiff had to prove that Frito-Lay priced below average variable cost or long-run incremental cost, it ignored the uncontroverted testimony of plaintiff's expert that Frito-Lay sold below long-run incremental cost. The district court, however, in light of that testimony, rejected the long-run incremental cost standard because a price above average variable cost cannot be predatory. The Seventh Circuit implicitly approved this analysis by adopting the district court's opinion. Appendix at 2a.

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON THE PROPER DEFINITION OF PREDATORY PRICING.

The Seventh Circuit's determination that proof of below incremental cost pricing is an essential element of any claim for predatory pricing directly raises the conflict concerning the definition of predatory pricing recognized by this Court in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). The decision below most obviously conflicts with the Ninth Circuit which has directly held that evidence of below-cost pricing is *not* an essential element of a predatory pricing claim. In *Transamerica Computer Company, Inc. v. International Business Machines Corporation*, 698 F.2d 1377 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983), the Ninth Circuit found that prices above average total cost may be predatory upon direct proof of predatory intent. See also, *Marsann Company v. Brammall, Inc.*, 788 F.2d 611 (9th Cir. 1986) (plaintiff's inability to determine defendant's cost does not justify summary judgment) and *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982) (cost-based test inappropriate when challenged conduct does not affect revenues or costs). If this case had been brought in the Ninth Circuit, there would be little doubt that the combination of evidence of Frito-Lay's market power, Frito-Lay's predatory intent, Frito-Lay's non-price related anti-competitive conduct, and barriers to entry would be sufficient to withstand a motion for summary judgment even in the absence of proof of below-cost pricing. Thus, the facts of this case make it an appropriate vehicle to resolve the conflict of whether proof of below-cost pricing is required.

Additionally, the decision below falls squarely in the existing conflict among the Circuits on the question of whether prices above incremental cost may be predatory. The Seventh Circuit's ruling required proof of below incremental pricing. The First, Second, and Sixth Circuits also appear to have adopted incremental cost as the appropriate cost standard. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-235 (1st Cir. 1983); *Northeastern Telephone Co. v. American Telephone & Telegraph Company*, 651 F.2d 76 (2d Cir. 1981); and *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984). However, at least the Third, Fifth, Eighth, Ninth, and Tenth Circuits have considered direct evidence of intent when prices are shown to be below average total cost. *O. Hommel v. Ferro*, 659 F.2d 340 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982), *reh. denied*, 456 U.S. 965 (1982); *International Air Industries, Inc. v. American Excelsior Company*, 517 F.2d 714, 723-725 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1346 (8th Cir. 1987); *Transamerica, supra;* and *Instructional Systems Development Corporation v. Aetna Casualty and Surety Company*, 817 F.2d 639 (10th Cir. 1987). These Courts of Appeal hold that prices over incremental cost, but below full cost, may be predatory depending on the existence of other evidence.

These conflicts justify the granting of this Petition for Certiorari.

II.

THE DECISION BELOW IGNORES CONTROLLING AUTHORITY HOLDING THAT A STRICT INCREMENTAL COST STANDARD IS INAPPROPRIATE UNDER THE ROBINSON-PATMAN ACT.

The Seventh Circuit's definition of predatory pricing as pricing below incremental cost in a Robinson-Patman case conflicts with this Court's decision in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). In *Utah Pie* a jury verdict in plaintiff's favor was affirmed upon the total mix of evidence of predation, including cost and non-cost evidence. Significantly, this Court did not adopt an incremental cost standard. Instead, evidence that defendant priced below direct cost plus an allocation for overhead was held sufficient to sustain the jury verdict given the existence of direct evidence of intent.

The decision below cannot be reconciled with *Utah Pie*. In *Utah Pie* the evidence supporting the jury verdict included proof that (1) the price discrimination was aimed at plaintiff; (2) price was a critical market factor; (3) plaintiff would lose business if it did not meet its competitor's price; (4) defendants lost more money in the relevant market than elsewhere; (5) defendants priced below direct cost plus an allocation for overhead; and (6) the below-cost pricing continued for 16 months.

In this case, plaintiff produced virtually identical proof of predatory intent. The district court found that (1) barriers to entry existed (Appendix p. 25a-26a); (2) Frito-Lay had engaged in the buying of shelf space (Appendix p. 26a); (3) Frito-Lay had sabotaged customers' tests of snack food sales to obtain shelf space at plaintiff's expense (Appendix p. 26a); (4) Frito-Lay discriminated in price in Chicago (Appendix p. 8a-9a); (5) the price discrimination was aimed at plaintiff (Appendix

p. 8a-9a); (6) Frito-Lay's total cost of producing potato chips for the Chicago market exceeded its revenues (Appendix p. 21a); and (7) the plaintiff offered corroborative circumstantial evidence of Frito-Lay's predatory intent (Appendix p. 27a). Such evidence clearly meets the standards for a Robinson-Patman Act violation established in *Utah Pie*. Despite this evidence, according to the courts below, plaintiff could not prove a primary line violation of the Robinson-Patman Act, absent proof of below incremental cost pricing. Only by ignoring *Utah Pie* could this decision be reached.

III.

THE DECISION BELOW RAISES IMPORTANT AND RECURRING QUESTIONS CONCERNING THE APPROPRIATE DEFINITION OF PREDATORY PRICING.

The decision below, conflicting as it does with other decisions, raises the important and recurring question of the appropriate definition of predatory pricing. In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, fn. 12 at 117 (1987), this Court acknowledged that "[n]o consensus has yet been reached on the proper definition of predatory pricing in the antitrust context". See also *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Both *Cargill* and *Matsushita* left unresolved the very questions concerning the appropriate definition of predatory pricing raised by the decision below.

Because of its factual context, this is the appropriate case for the Court to answer these important questions. As the district court recognized, plaintiff presented evidence that the need for supermarket shelf space created significant barriers to entry into the snack food market. Coupled with Frito-Lay's market power, these barriers to entry made a strategy of sacrificing present revenue for

the purpose of limiting competition plausible because Frito-Lay could recoup lost revenues before rivals could enter the market. Thus, this case clearly turns upon the definition of predatory pricing.

Both in *Matsushita, supra,* and *Cargill, supra,* the factual context of the cases made it unnecessary for this Court to resolve these questions. However, this case squarely presents the Court with the question of the appropriate definition of predatory pricing. Unlike *Matsushita, supra,* a Sherman Act § 1 case, plaintiff here makes claims under both § 2 of the Sherman Act and the Robinson-Patman Act. Moreover, unlike *Cargill, supra,* plaintiff has not only claimed that defendant acted with predatory intent but presented evidence which the district court found to be "corroborative circumstantial evidence of Frito-Lay's predatory intent" (Appendix p. 27a).

The current debate over the definition of predatory pricing is more than an academic debate. As this Court acknowledged, predatory pricing does occur. *Cargill, supra,* at 121. This Court should now resolve the debate and determine which approach to predatory pricing should be followed.

IV.

THE DECISION BELOW MISAPPLIES CONTROLLING AUTHORITY CONCERNING THE PROPER STANDARD FOR SUMMARY JUDGMENT.

The Seventh Circuit, in apparent reliance on *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), held that plaintiff was required to come forward with sufficient evidence of below incremental cost pricing in order to avoid entry of summary judgment. However, in determining whether plaintiff's evidence was sufficient, the Courts below, contrary to the admonitions of this Court, decided between competing reasonable inferences. This was error.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court succinctly stated that, despite the temptation to do otherwise, a trial judge "is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *id.* at 249. According to the Court

> [t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

id. at 250. The decision below ignores this authority.

Here, plaintiff presented evidence from which a jury could reasonably infer that Frito-Lay's incremental expenses exceeded its revenues. Plaintiff's expert submitted two affidavits supporting this conclusion.[2] Indeed, the Court noted that plaintiff's cost analysis showed that Frito-Lay's costs exceeded its revenues. Frito-Lay offered no contrary testimony or evidence. This uncontroverted expert testimony, based on an accepted methodology, should have been sufficient to defeat the motions for summary judgment, especially since the determination of cost is a factual issue for the jury. See, *Instructional Systems, supra;* and *Henry Chloride, supra.* The courts below tried the factual issues rather than merely determining whether a triable issue existed. This unwarranted expansive view of summary judgment misapplies controlling precedent.

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[2] Plaintiff submitted the first Affidavit of Roger Kormendi in Opposition to Frito-Lay's first Motion for Summary Judgment. After entry of the district court's order granting summary judgment, plaintiff submitted the second Affidavit of Roger Kormendi in Support of its Motion for Reconsideration.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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Dated: December 6, 1988

APPENDIX

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

(Argued February 9, 1988)

September 8, 1988

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. JESSE E. ESCHBACH, Senior Judge

No. 87-2158

JAY'S FOODS, INC.,
Plaintiff,

and

LSLJ PARTNERSHIP,
Plaintiff-Appellant,

vs.

FRITO-LAY, INC., a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 4352
James B. Moran,
Judge

ORDER

LSLJ Partnership, the assignee of Jay's Food, Inc.'s ("Jays") antitrust claims against Frito-Lay, Inc. ("Frito-Lay"), appeals from the district court's summary judgment in favor of Frito-Lay. Jays alleges that Frito-Lay attempted to monopolize the Chicago potato chip market

from 1974 to 1980 by engaging in predatory pricing, geographic price discrimination, and various other anticompetitive practices in violation of section 2 of the Sherman Act, 15 U.S.C. § 2, section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. Ch. 121 1/2 §§ 261 *et. seq.* In a series of exhaustive opinions rendered over a two year period, Judge Moran disposed of Jay's claims. *Jays Foods, Inc. v. Frito-Lay, Inc.*, 614 F. Supp. 1073 (N.D. Ill. 1985); *Jays Foods, Inc. v. Frito-Lay, Inc.*, 635 F.Supp. 103 (N.D. Ill. 1986); *Jays Foods, Inc. v. Frito-Lay, Inc.*, 664 F.Supp. 364 (N.D. Ill. 1987); *Jays Foods, Inc. v. Frito-Lay, Inc.*, 656 F. Supp. 843 (N.D. Ill. 1987). We hereby affirm and adopt the opinions of the district court.

Jay's contention that Judge Moran improperly weighed the evidence in ruling on Frito-Lay's summary judgment motions is unavailing. Jay's bore the burden of demonstrating that Frito-Lay engaged in below-cost pricing in order to prevail on its predatory pricing claims here. As *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), makes plain, where the nonmoving party bears the ultimate burden of proof at trial, it must "make a showing sufficient to establish the existence of [the] element[s] essential to the party's case" in order to withstand a motion for summary judgment. *See also The Chicago Florsheim Shoe Store Co. v. Cluett, Peabody & Co., Inc.*, 826 F.2d 725 (1987).

After reviewing the record before us, we agree with Judge Moran that

> Jays simply has failed to make out even the outlines of a case of predatory pricing. *MCI* makes it clear that an essential element of a predatory pricing case is proof that defendant's prices were below average variable or long-run incremental costs. After com-

> pleting its discovery and after having many months to send legions of experts through the thickets of cost data, plaintiff has failed to come close to satisfying either cost standard.

614 F.Supp. 1073, 1084.

The judgment of the district court is affirmed and adopted as the opinion of this court.

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 8, 1988

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. JESSE E. ESCHBACH, Senior Circuit Judge

No. 87-2158

JAY'S FOODS, INC.,
Plaintiff

and

LSLJ PARTNERSHIP,
Plaintiff-Appellant

vs.

FRITO-LAY, INC., a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 4352
James B. Moran,
Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAYS FOODS, INC., a corporation,
Plaintiff,

vs.

FRITO-LAY, INC., a corporation,
Defendant.

No. 78 C 4352

MEMORANDUM AND ORDER

This action, in which plaintiff Jays Foods (Jays) alleges that it was a victim of predatory pricing, comes before this court ten years after the seminal article by Professors Areeda and Turner which outlined a cost-based definition of predatory pricing. Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975). Defendant Frito-Lay's (Frito-Lay) motion for summary judgment on Count I requires this court to determine what fealty to give cost-based tests of predatory pricing in light of a decade of judicial responses to the article and its progeny. It also comes in the wake of full and complete discovery. The question, therefore, is whether there is sufficient evidence to create triable issues.

I.

Frito-Lay is a national producer of a full range of salty snack foods such as potato chips and pretzels (Ex.9,

p.206653). Its competitors include regional suppliers of a more limited range of snack foods (Ex.30, p.164719). Jays is one of these regional competitors. Its primary product is potato chips and its market consists of parts of Illinois, Wisconsin, Michigan and Indiana.

In an antitrust case plaintiff has the burden of establishing the relevant product and geographic markets. *See L.A. Draper & Son v. Wheelabrator-Frye Co.*, 735 F.2d 414 (11th Cir. 1984). While Jays' complaint covers several products and geographic markets, for purposes of the motion for summary judgment the relevant geographic market is the Chicago area and the relevant product is potato chips. The summary judgment motion is further focused on the sale of potato chips in supermarkets. Supermarket sales account for over 60 per cent of the total sales of snack foods (Exs. 1 and 39). The Chicago market is presumably the center of Frito-Lay's allegedly illegal competitive practices, and is the largest market served by Jays.

Potato chip sale levels are related to the amount of supermarket shelf space available to a supplier (Ex.2, pp.238-240; Ex.12, p.146; Ex.26). Sales levels are also related to promotional incentives given stores and their customers (Ex.6). Sufficient shelf space is also required to introduce new products (Ex.20, p.201317). Stores allocate shelf space to suppliers on the basis of the sales of each supplier's products (Ex.2, pp.219-20).

There seems to be a little doubt that in the day-to-day commercial warfare between snack food suppliers the key battle is over shelf space (Ex.13). Frito-Lay believed that the company with the greatest share of potato chip business would control the entire salty snack sections of the supermarkets (Ex. 10, p.197034). Because potato chip sales were the core of the regional competitors' strength, Frito-Lay especially sought to increase its market share of

potato chips (Ex.32, p.186375). In its complaint Jays alleges that Frito-Lay provided misleading and inaccurate market studies to major retailer chains in order to increase its share of shelf space at the expense of other competitors. Frito-Lay also allegedly engaged in advertising and promotional practices which helped it to secure additional shelf space (Ex.6). Finally, Frito-Lay allegedly used its dominance in the corn chip market as leverage to induce stores to provide additional shelf space for its other products (Ex.9, p.206653).

During the 1974-1980 period which is the subject of this lawsuit,[1] Jays was the larger of the two potato chip suppliers in the Chicago area. During the same period Jays was apparently attempting to expand into other salty food product lines and become a supplier of a full range of snack products (Ex.11). Both companies' sales grew during this period. In 1974 Frito-Lay's Chicago division had total sales of $7,559,630 and showed a loss of $35,329. By 1980 its sales had nearly doubled to $13,545,170 and its profits had reached $1,057,830. The record does not contain figures for Jays' performance in the Chicago market. Jays' total net sales grew from $22,970,172 in 1974 to $44,352,969 in 1980. Jays' pretax profits rose from $139,749 in 1974 to $2,319,620 in 1977, before tapering off to $948,557 in 1980 (Stip. #9). The record does not indicate what shifts occurred in each company's share of the Chicago potato chip market.[2]

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[1] Jays filed its complaint on Nov. 3, 1978. Frito-Lay argues and Jays concedes that the four-year statute of limitations, 15 U.S.C. § 15b, bars Jays from recovering damages suffered prior to Nov. 3, 1974.

[2] Frito-Lay apparently had more than a 25% share of the potato chip market by mid-1978 (Ex.23, p.176905). By the late 1970s Jays potato chips outsold Frito-Lay potato chips within Chicago (Ex.38, p.168621), but Frito-Lay had a 55% share of the total salty snack food business in Chicago while Jays' share of that market was 24% (Ex.34, p.182435).

The record makes clear that Chicago was one of the "problem" markets for Frito-Lay. Frito-Lay faced strong local competition in potato chip sales and its performance lagged relative to other markets (Ex.30, pp.164726-727, 164736; Ex.31, pp.174064-65). Consequently, Frito-Lay devoted extra promotional and advertising resources to the Chicago market. These promotions included substantial price discounts, some of which were unauthorized (Ex.17), and a strong emphasis on potato chips in the supermarket display shelves ("overfacing") (Exs.10 and 11).

The record suggests that Frito-Lay sets its prices with an eye towards competitive conditions. A summary of Frito-Lay's pricing objectives identified three approaches to pricing based on market conditions (Ex.27). In high-growth product categories, where Frito-Lay had market leadership, prices were to be set "most aggressively." In low-growth categories, where Frito-Lay had shared market leadership, prices were to be less aggressive. Finally, in "low-growth categories where we do not dominate we will price competitively (*e.g.* potato chips)." (*Id.*)

What is also evident from the record is that Frito-Lay's guide in setting prices was its corporate financial goals (Ex.27). Its pricing decisions were "designed to maintain total corporate gross margin at target level of 50%." *Id.*

According to Jays, Frito-Lay also sold potato chips in Chicago for a lower profit in order to increase its market share. Frito-Lay purportedly was willing to lower its profit in Chicago and other problem markets because it could subsidize these lower profits with the higher profits earned in markets where it faced little or no competition. Frito-Lay's prices for identical products varied from mar-

ket to market (Ex.5), at least in part because Frito-Lay took over regional companies with established price patterns (Ex.4). Regional price variations also resulted from the different competitive conditions faced by Frito-Lay in various markets (Ex.18). Frito-Lay prices for some potato chip products in the Chicago market were lower for significant periods than prices for the same products in other markets (Ex.5; Ex.20. p.201324; and Ex.21, p.207878).

Jays' first amended complaint contains three counts. Count I alleges that Frito-Lay has engaged in predatory pricing in violation of Section 2 of the Sherman Act. Count II is brought under Section 2 of the Clayton Act and alleges that Frito-Lay has engaged in illegal price discrimination. Count III contains pendent claims brought under the deceptive trade practices laws of the states served by Jays and alleges that Frito-Lay engaged in anti-competitive conduct. Jays claims that it sustained a loss totalling $4,311,806.73 for fiscal years 1975-1981, because of its inability to increase prices to reach a 6% pretax rate of return as a result of Frito-Lay's anti-competitive conduct.

II.

In Count I Jays claims that Frito-Lay attempted to monopolize the Chicago market for potato chips in violation of Section 2 of the Sherman Act. 15 U.S.C. § 2. The elements of an attempt to monopolize are (1) intent to control prices or destroy competition with respect to a part of commerce; (2) predatory or anti-competitive conduct directed at accomplishing the unlawful purpose; and (3) a dangerous probability of success. *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 430 (7th Cir. 1980).

The parties agree on the definition of predatory pricing as the dominant firm's deliberate sacrifice of current revenues through lower prices for the purpose of driving rivals out of the market. Once it has vanquished its rivals, the dominant firm can more than recoup its short-term losses through higher profits earned in the absence of competition. *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1112 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983). The parties disagree on the proper test for predation, namely, the sufficiency of cost-based measures of predation and the relevance of non-cost indicia of predatory intent.

The modern era of predatory pricing analysis was ushered in by Professors Areeda and Turner. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975). They argued that prices at or above marginal cost, even if not profit-maximizing, generally should be presumed to be non-predatory. *Id.* at 711. Marginal cost is the "increment to total cost that results from producing an additional increment of output." Because marginal costs are difficult to determine, Areeda and Turner advanced average variable cost as an acceptable surrogate for marginal cost. *Id.* at 716-718. Variable costs are costs which vary in a short run with changes in output. Such costs include items such as materials, labor, fuel, use depreciation, and a return on investment needed to attract enough working capital to pay for variable costs. Average variable cost is total variable cost divided by output. Fixed costs, in contrast, are costs which in the short run do not vary with changes in output. Fixed costs include such items as management expenses, interest on bonded debts and other items of irreducible overhead. Total cost is the sum of fixed and variable costs and average total cost is the total cost divided by output. *See*

generally Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76 (2d Cir. 1981).

The Areeda & Turner formula has won wide if cautious acceptance by the courts. Some courts have hewed closely to average variable cost as the conclusive test of predatory pricing. *See e.g. Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *Northeastern Telephone, supra.* Most courts have recognized the central importance of a cost-based test of predatory pricing, but have noted that in unusual circumstances special market characteristics, such as high entry barriers, might permit a finding of predatory pricing even if prices were above average variable cost but below average total cost. *See e.g. Chillicothe Sand & Gravel*, 615 F.2d at 431-32; *Pacific Engineering & Product Co. v. Kerr McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 723-25 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). The Ninth Circuit has strayed most from sole reliance on a cost-based test of predation. *See Transamerica Computer Co., Inc. v. IBM Corp.*, 698 F.2d 1377 (9th Cir. 1983). *See also D. E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir. 1983), *cert. denied* 104 S.Ct. 3513 (1984). In *Transamerica* the court held that by reference to non-cost factors a plaintiff could show that a defendant engaged in predatory pricing even if its prices were above average total cost. *Id.* at 1386-88.[3]

[3] Courts generally have held that plaintiff makes out a prima facie case of predatory pricing by showing that defendant's prices fell below average variable cost and are thus presumptively predatory. When prices are above average variable but below average total cost plaintiffs must rebut the presumption that the prices are not predatory. *See generally* William Inglis & Sons Baking Company v. ITT Continental Baking Company, Inc., 668 F.2d 1014, 1035-36 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982). The Transamerica court set plaintiff's burden even higher when defendant's prices are above average total cost. 698 F.2d at 1388.

In *Chillicothe Sand & Gravel* the Seventh Circuit recognized the centrality of the average variable cost test in the analysis of a predatory pricing claim. It cautioned, however, that non-cost factors were not to be neglected when determining whether a defendant's pricing policy was predatory:

> [W]hile we accept the use of marginal or average variable cost as both a relevant and an extremely useful factor in determining the presence of predatory conduct we are willing to consider the presence of other factors in our evaluation of whether or not plaintiff has made out a prima facie case of monopolizing or attempt to monopolize.

615 F.2d at 432. Indeed, after concluding that defendant's prices were above average variable cost, the *Chillicothe* court went on to consider and ultimately to reject a variety of non-cost factors which plaintiff had argued revealed defendant's predatory intent. *Id.* at 432-34.

In *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th cir.), *cert. denied*, 104 S.Ct. 234 (1983), the Seventh Circuit confronted allegations that AT&T had engaged in predatory pricing of two of its services for long distance business communications. *MCI*, 708 F.2d at 1111. The issue at *MCI* was not the validity of the Areeda and Turner average variable cost test; neither party ever argued for application of a short run cost standard. 708 F.2d at 1115. While *MCI* noted some of the shortcomings of the average variable cost test, *id.* at 1115-16, the decision cannot be read as a repudiation of that test. In fact, the court expressly stated that "pricing below average variable cost is normally one of the most relevant indications of predatory pricing." *Id.* at 1120, n.55.

Perhaps the strongest and most repeated criticism of the average variable cost test of predatory pricing is its

focus on short term rather than long term costs. *See e.g.* Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv.L.Rev. 869, 890 (1976). Then Professor Posner, for example, recognized the usefulness of the Areeda and Turner average variable cost formula, but concluded that predatory pricing also exists when a company sells its product below its long-run marginal cost with the intent to exclude a competitor. R. Posner, *Antitrust Law*, at 189. Long-run marginal costs are costs that must be recovered in order for a business to survive into the indefinite future. *Id.* Because all costs are variable in the long run, long-run marginal costs include both the fixed and variable components of short-term costs.

In *MCI* the court adopted a long-run incremental cost of providing the two long distance services as the standard by which to determine if AT&T's prices were predatory. The long-run incremental cost of producing a product is total company cost minus what the total cost of the company would be in the absence of manufacturing the product, divided by the quality of product being manufactured. *See* Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 Yale L.J. 1, 9, n.26 (1979). Long-run incremental cost includes fixed as well as variable cost of both capital and operating items. Unlike measures of fully distributed cost, long-run incremental cost is calculated with reference to current and anticipated cost, rather than historical or imbedded cost. *MCI*, 708 F.2d at 1116-18. The long-run incremental cost test, in short, measures the costs caused by the production of a product. *Id.* at 1116. Other courts have been slow to adopt the long-run incremental cost approach.

MCI is also important for its discussion of the rule of non-cost factors in the analysis of predatory pricing. The court's most complete statement on the issue was:

> We do not intend to imply that in *all* cases and in *all* circumstances we would only examine the price-cost relationship of a product or service. Our test merely suggests that a judge and jury may not *infer* predatory intent unless price is below long-run incremental cost .... [However,] a strong presumption of lawfulness must attach when price is shown in a case like this one to be an appropriately derived measure of incremental cost.

708 F.2d at 1123, n.59 (emphasis in original).[4]

The legacy of *Chillicothe* and *MCI* is clear but incomplete. There are two cost-based tests for predatory pricing. The average variable cost test focuses on short-term cost. The long-run incremental cost test measures the long-term cost caused by the production of product. While non-cost factors are important adjuncts to the cost-based tests, the cost tests play a central role in the analysis of predatory pricing. The Seventh Circuit has not indicated if it will follow the Ninth Circuit in holding that prices above short-run total cost may in some circumstances be predatory. It reasonably can be implied from *MCI* and *Chillicothe*, however, that prices above average variable cost but below average total cost might be predatory in light of striking non-cost indicia of predation or unusual market conditions.

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[4] There is no indication that the MCI decision requires any different treatment of non-cost factors when the long-run incremental cost test rather than the average variable cost test is employed.

III.

For a predatory pricing action of this magnitude, the data on prices and costs are disconcertingly meager (Ex.41). Plaintiff concludes that "since Frito-Lay does not regularly isolate total cost for any division, including Chicago, these [cost] records do not permit the determination of costs for potato chips sold in Chicago." In its brief plaintiff devotes six pages demonstrating that the cost data are incomplete and capable of various interpretations. Plaintiff's position is that as a matter of law it need not show that Frito-Lay priced potato chips below applicable cost levels or, alternatively, that the inadequacy of the cost data precludes summary judgment. Defendant argues that it is entitled to summary judgment because the plaintiff has not marshalled cost data in acceptable form and because the existing data indicates that its prices were not predatory.

The key piece of cost data is a "total cost study" covering the years 1974-1980, which plaintiff prepared for use in cross-examining the defendant's expert (Ex.42). The study shows that Frito-Lay's total costs were generally under its revenues. Plaintiff explains that the cost study is inaccurate because it relies upon overly conservative methodological assumptions. Plaintiff stated that it intended to provide better and presumably more favorable cost data at a later date, though it has provided relatively little in the many months during which Frito-Lay's motion has languished.

The cost study purports to show the total cost of manufacturing, promoting and selling potato chips in Frito-Lay's Chicago division. The total cost figures includes the amounts expended upon (1) manufacturing, (2) selling and freight, (3) advertising and merchandising, and (4) general and administrative expenses. The

study, which is broken down into four-week periods, reveals that Frito-Lay lost $459,275 in 1974 and $292,521 in 1975, and showed profits of $75,819, $7,022, $303,787, $186,524 and $1,057,830 in the years 1976 to 1980, respectively.

A. Average Variable Cost

The cost study is flawed as an indicator of average variable cost. For example, it does not differentiate between the fixed and variable components of total cost. On its face, however, the study suggests that Frito-Lay's average variable cost did not regularly exceed its per unit prices. First, because average variable cost is but a part of total cost, Frito-Lay could not have been selling above variable cost in the years (1976-1980) in which its sales revenue exceeded its total cost. Second, the 3% difference between sales revenue and total cost in 1975 would almost certainly be substantially less than the percentage of total costs which were fixed.[5]

Plaintiff has undertaken its own analysis of average variable cost for a single four-week period in 1976 (Ex.68). It determined that average variable cost exceeded sales revenue by $3,559 during the period. When viewed in context, this finding actually supports defendant's position. First, plaintiff considered 99% of total manufacturing cost and 98% of total non-manufacturing cost during the period to be variable, surely an overestimation given the short time span. Second, according to the total cost study, Frito-Lay's loss during this four-week period was its third worst of the 91 periods covered by the study. Frito-Lay's loss during this period fell under the 1974 profit/loss average by $42,571. Corresponding figures for the years 1975 through 1980 were

[5] The cost study shows that Frito-Lay's revenues exceeded its total cost for the last eight weeks of 1974.

$58,856, $153,719, $84,922, $100,9771, $169,227 and $236,196, respectively. That Frito-Lay's revenues fell below average variable cost by only $3,559 in such an abysmal performance period, and that this figure is based upon questionable methodological assumptions, can only mean that Frito-Lay's prices were above average variable cost in almost all other periods.[6]

Plaintiff appears to suggest that it is entitled at a minimum to recover treble damages for each four-week period in which Frito-Lay's potato chip revenues fell below its total cost for the same period. Average variable cost and not total cost is, however, the short-run cost measure. Even assuming that Frito-Lay's average variable cost was above its revenue during some four-week periods—a questionable assumption given plaintiff's designation of all but a miniscule percentage of cost as variable—it is doubtful whether plaintiff is entitled to base its recovery on such short-term perturbations. It is unclear from the cost study what degree of correspondence there is between the revenue derived from sales during the period and the costs allocated to that period. More importantly, given the relatively long periods between Frito-Lay's price changes (Ex.5), and the short-run fluctuations in costs shown in the cost study, it is not evident that Frito-Lay priced below its *reasonably anticipated* average variable cost. *See* Areeda & Turner, *Antitrust Law*, ¶ 715(d) at p. 174.

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[6] In 1981 Price, Waterhouse & Company prepared an analysis of a contribution made by the sale of potato chips in the sale zone which included Chicago (Ex.47). The study found that the potato chips made a positive contribution on a variable cost basis each year during the 1974-1980 period. That is, for the zone as a whole, Frito-Lay was selling its potato chips above its average variable cost. Plaintiff's theory, of course, is that Frito-Lay was selling its supermarket potato chips below its average variable cost in Chicago, even though its potato chips prices may have exceeded average variable cost throughout the zone as a whole.

While marginal cost generally is below average total cost, at high levels of production where production facilities are operating beyond optimum capacity marginal costs may be above average total cost. Areeda & Turner, *Antitrust Law* (1982 Supp.) ¶ 715.4(c) at p. 155. In rare cases a defendant who operates a plant well beyond its optimum capacity may be engaged in predatory pricing even while earning significant profits. *Id.* at 156.

Plaintiff suggests that Frito-Lay's production facilities were being utilized at the level well over optimum capacity during the relevant period. The evidence is far from conclusive in this regard. Plaintiff has produced evidence which indicates that Frito-Lay officials were concerned about expanding snack food production facilities nationwide to keep pace with growing demand (Ex.21, p.207877; Ex.46, p.201549; Ex.53, p.202880; Ex.54; Ex.56, p.203109; Ex.57, p.203221; Ex.60, p.27904; and Ex.61, p.203444). The record also shows that there were spot shortages of Frito-Lay products in some areas due to strikes, poor materials, bad weather, and, on occasion, capacity constraints due to spurts in demand caused by promotions (Ex.9, p.206703; Ex. 29, p.203629; Ex.51; Ex.54; Ex.58; Ex.59; Ex.62; and Ex.63). The existence of spot shortages does not necessarily indicate that production facilities were over-utilized. In fact, Frito-Lay could well have decided to have spot shortages rather than to utilize production facilities uneconomically at well over optimum capacity.

The only hard evidence of the utilization of Frito-Lay's potato chip production facilities nationwide does not indicate sustained production at over-capacity levels. Records from 1979 show that Frito-Lay operated its potato chip production facilities at over 100% of capacity for only two weeks and production levels during these weeks never exceeded 105% of capacity (Ex.9 at p.206695).

The running average for capacity utilization for the year never exceeded 90%. *Id.* Capacity utilization records for the first half of 1980 show only one big jump during a single week to 100% capacity utilization (Ex.64, p.18200). Capacity utilization over the six four-week periods averaged only 77.4%. *Id.* p.180198.

This data is of limited use because of its nationwide scope. The only information about production levels at the Allen Park plant, the largest supplier of potato chips for the Chicago market (Ex.40, p.219446), suggests that in 1979 and 1980 capacity well exceeded demand (Ex.D to Deft's Reply Memo). In 1979 capacity was 5,900 units, while demand was projected to be 2,731 units. In 1980 capacity was unchanged and demand was expected to rise to 3,085 units. Projected demand was well under capacity of the Allen Park plant through 1983.[7]

While establishing that Frito-Lay was concerned about maintaining adequate capacity in the face of rising demand and that a variety of circumstances led on occasion to spot shortages, plaintiff has done no more than establish that in three out of seventy-six weeks Frito-Lay's plants nationwide were operating at over 100% but under 110% of capacity. During a good portion of the same period demand was apparently less than 50% of capacity at the plant which supplied most of the potato chips to the Chicago market. Even assuming that marginal costs did exceed average total costs during several weeks—a questionable assumption given the slight extent of the production over capacity—and assuming that the Allen Park plant was over-utilized—a fact for which there

[7] The Allen Park plant was somewhat more inefficient that most other Frito-Lay plants (Ex.43, p.205123). Plaintiff points out that cost study, which may not have fully accounted for the inefficiencies of the Allen Park plan, may thus understate actual cost.

is no support—this court would be reluctant to base liability on such short-term periods of production over capacity levels. Such an approach would be inconsistent with the purpose of the antitrust laws. Companies would be reluctant to engage in vigorous price competition if they faced treble damages for each period, no matter how short, that their prices happened to fall below their marginal cost because of unusually high production levels. *Cf. Barry Wright Corp.*, 724 F.2d at 234 (arguing against too rigid an adherence to economic principles in antitrust analysis).

The shortcomings of plaintiff's position might be overcome by three factors. First, there is no evidence in the record as to the utilization of Frito-Lay's potato chip plants during much of the period covered by the lawsuit. Perhaps capacity constraints were greater from 1974 through 1978. Second, not all the potato chips for the Chicago market were produced at the Allen Park plant. Conceivably, production levels at the other plants supplying Chicago were substantially above capacity. Third, the optimum capacity of the Frito-Lay plants could have been below the full capacity level established by Frito-Lay. The existing plant utilization data thus might understate the extent to which production exceeded optimum capacity. Yet, after extensive discovery, plaintiff has not been able to advance evidence in support of any of these suppositions.

B. Long-Run Incremental Cost

The data is even more unsatisfactory with respect to long-run incremental cost. Both parties agree that plaintiff's cost study is a measure of fully distributed costs. The Seventh Circuit has rejected fully distributed cost as a standard with which to examine a company's long-term pricing policy. *MCI*, 708 F.2d at 1119-1123. In some circumstances fully distributed costs may be an acceptable

proxy for long-run incremental costs. *See MCI*, 708 F.2d at 1116, n.47. For example, the average balance sheet cost of a single product enterprise in a stable economy may provide an acceptable proxy for long-run incremental cost. *Id.* Frito-Lay, however, produces numerous products. During the period covered by the lawsuit the economy was not stable. The potato chip market itself was dynamic and Frito-Lay was making significant capital expenditures in new plants in order to meet rising demand.

One can draw suppositions from the data in favor of both parties. For example, in its supplemental memorandum Jays presents a revised cost study which adds the costs of attracting investment capital to the tally of total costs. Capital costs are properly included in the calculation of long-run incremental cost. *MCI*, 708 F.2d at 1118. As revised, plaintiff's cost study shows that Frito-Lay's total cost of producing potato chips for the Chicago market exceeded its revenues. Moreover, plaintiff's cost study may understate the actual and anticipated costs from which the long-run incremental cost figure is derived.

On the other hand, as defendant points out, the total cost study may significantly overstate the costs attributable to the production of potato chips for the Chicago market. Long-run incremental costs include only those costs attributable to the production of a particular product. Apparently, not all of the costs which Frito-Lay would have incurred even if it were not producing potato chips have been deducted from the total cost study. For example, the administrative expenses which Frito-Lay would have incurred in the absence of supermarket potato chip lines might not have been significantly different than the amount of administration expenses shown in the total cost study. If so, the figures for administrative expenses are substantially inflated for purposes of a measure of long-run incremental cost. In sum, the data is so

fragmentary that no meaningful judgment can be made as to whether Frito-Lay priced its supermarket potato chips beneath its long-run incremental cost.

IV.

Jays' position is that non-cost factors alone can be determinative of Frito-Lay's liability. *Chillicothe* and *MCI* cast substantial doubt on this position, at least in the usual predatory pricing case. Yet, the decisions do require consideration of non-cost factors in conjunction with the application of cost-based measures of predation.

A. Profit Cross-Subsidization

Jays has assembled evidence that Frito-Lay set prices on a regional basis (Ex.18). In regions where Frito-Lay had relatively little competition, prices were set higher than in regions like Chicago, where Frito-Lay faced vigorous competition. Jays argues that Frito-Lay compensated for the lower profits it earned in Chicago by charging higher prices elsewhere. According to Jays, Frito-Lay's lower prices in Chicago were predatory. In *MCI* the Seventh Circuit considered and rejected an identical profit cross-subsidization theory. The court stated that the so-called subsidization of low prices in competitive markets by higher prices in less competitive markets was actually a chimera, as long as the price in the competitive market exceeded long-run incremental cost in the market:

> When a multiproduct firm prices a competitive service above its long-run incremental cost, no cross-subsidy can occur because the additional revenues produced exceed all additional cost associated with the competitive service and provide a contribution to the unallocable common cost otherwise borne by the firm's existing customers.

MCI, 708 F.2d at 1124. Assuming that Frito-Lay's potato chip prices in Chicago were set above long-range incremental cost, no cross-subsidization occurred for which liability could attach on a monopolization theory.

B. Profit Maximization

In a position related to the theory of price cross-subsidization, Jays argues that Frito-Lay's purported failure to maximize its profits in Chicago was conclusive evidence of predatory pricing (Ex.18). The *MCI* court left no doubt of its rejection of the profit maximization theory:

> [W]e must reject such "profit maximization" theory as incompatible with the basic principles of antitrust. The ultimate danger of monopoly power is that prices will be too high, not too low. A rule of predation based on the failure to maximize profits would rob consumers of the benefits of any price reductions by dominant firms facing new competition. Such a rule would tend to freeze the prices of dominant firms at the monopoly levels and would prevent many pro-competitive price cuts beneficial to consumers in other purchases .... It is in the interests of competition to permit dominant firms to engage in vigorous competition, including price competition. We therefore reject *MCI*'s "profit maximization" theory and reaffirm this circuit's holding that liability for predatory pricing must be based upon proof of pricing below cost.

MCI, 708 F.2d at 1114 (footnote and citations omitted). In this case Frito-Lay was not even the largest supplier of potato chips for the Chicago market. Its adoption of non-profit maximizing prices in response to Jays' competitive challenge was thus more reasonable and more necessary than if it has been the dominant supplier.

C. Entry Barriers

Jays describes the barriers to entering the snack food market as "almost insurmountable." As common sense

suggests, supermarket sales of potato chips depend to a large extent upon the shelf space allocated to a supplier. A supplier needs adequate shelf space to compete successfully in the cacophony of kinds, colors, shapes and sizes of the various snack food products and their packages. Too little shelf space creates difficult supply problems requiring frequent restocking. Inadequate shelf space will also hinder expansion into new product lines. Supermarkets allocate shelf space on the basis of sales. Because they allocate shelf space relatively infrequently, and because of the tie between shelf space and sales, shelf space once lost is difficult to regain. Getting shelf space in the first place can be a daunting task (Ex.12, p.137-38).

Jays' position is that the link between sales and shelf space, the difficulties in recapturing lost space, and the obstacles to gaining access to supermarket shelves, create a substantial barrier to entry into the Chicago potato chip market. This barrier was important for two reasons. First, because barriers to entry protect the inflated profits of a monopolist, the attractiveness of predatory pricing is directly proportional to the height of the barriers. Second, Jays argues that the efforts taken by Frito-Lay to increase its allocation of shelf space reflects Frito-Lay's predatory intent.

In the absence of substantial evidence to the contrary, this court has doubts as to whether the purported entry barriers caused by shelf space limits are unusually high for potato chips. Presumably all products for which supermarket sales are important can be said to have equally high entry barriers. Assuming the existence of entry barriers, it is also unclear whether Jays, the largest potato chip supplier in the Chicago area, faced unusual difficulties in maintaining or expanding its share of supermarket shelf space or in penetrating into new supermarkets.

MCI appears to minimize the importance of high entry barriers in the analysis of predatory pricing. Some courts have held that high entry barriers may make prices above average variable cost but below short run profit maximizing levels predatory. *See e.g. International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). The *MCI* court did suggest that in some circumstances a short-run average variable cost test might be inappropriate where entry barriers are high, 708 F.2d at 1121, n.57. Yet, the court indicated that high entry barriers did not affect the viability of a measure of average total cost, such as the long-run incremental cost test. Indeed, entry barriers may not even have to be considered when the long-run incremental cost test is employed:

> An important, but presently theoretical, issue not directly before this court is the propriety of using short-run marginal cost (as opposed to some measure of average total cost) in predatory pricing cases involving industries with high entry barriers ... there is some evidence that barriers to entry may be high in the long distance telecommunications field. There is also evidence, however, that the development of microwave technology has significantly lowered these barriers. *Because the parties here have argued from measures of average total cost we do not reach this question.*

Id. (emphasis added) (citation omitted). The *MCI* court never considered the effects of entry barriers as part of its application of the long-run incremental cost test.

In this case it is near certain that Frito-Lay priced its potato chips above average variable cost. When all inferences are drawn in plaintiff's favor it appears, however, that entry barriers in the Chicago market might be high enough to cast some doubt on the propriety of strict

adherence to the average variable cost test in the face of convincing non-cost evidence of predatory behavior. *MCI* seems to indicate that the long-run incremental cost test is unaffected by the presence of high entry barriers. Here the long-run incremental cost data is too rudimentary for a supportable conclusion that there has been predation.

Jays also points to evidence of anti-competitive efforts by Frito-Lay to increase its share of supermarket shelf space. When all inferences are drawn in Jays' favor, it appears that some Frito-Lay employees may have attempted to buy extra shelf space and to sabotage supermarket tests of snack food sales in order to obtain more space (Exs.13-15). While such evidence, if true, is not conclusive of liability, this being after all a predatory *pricing* case, it has some weight as circumstantial evidence of a predatory scheme.

D. Expressions of Predatory Intent

Jays has culled from the Frito-Lay files various expressions of competitive combativeness by Frito-Lay employees (*see e.g.* Ex.16, p.161286; Ex.18, p.162483; Ex.20, pp.201316, 201323; Ex.23, p.176901; Ex.34, p.182434035; Ex.35-37; and Ex.46, p.174074). Courts are to approach purported expressions of predatory intent by company officials warily:

> Even if it were possible to identify those persons within a firm whose intentions are relevant, the meaning of the evidence will usually be obscure. After all, competition consists of winning business from rivals. The intent to preserve or expand one's market share is presumptively lawful. To encourage judges and juries to rely overly on non-probative data allegedly bearing on a firms "state of mind" invites the twin mischiefs of (1) burdening the litigation with thousands of documents about the firm's motives and calculations, and (2) encouraging inconsistent and quixotic results.

MCI, 708 F.2d at 1113.

The closest the evidence comes to a "smoking pistol" is a statement in a memorandum:

> *Maximum Impact on Competition*—By placing incremental effort behind these low share markets, we would maximize the effectiveness of our spending, since these markets account for 77% of the volume of our top five competitors and 77% of all branded competition. This is significant since the bulk of our major competition's volume/profit comes from their potato chip business. *Focusing our efforts on potato chip growth is most likely to hinder aggressive competitive expansion.*

(Ex.23, p.176901 (emphasis added); *see also* Ex.16, p.161286.) This statement, however, is part of a discussion of where Frito-Lay should focus its promotional resources and is not directly connected to Frito-Lay's pricing policy. It is alone far from conclusive on the issue of whether Frito-Lay engaged in predatory pricing. The remaining intent evidence appears to be primarily naive expressions of competitive zeal. In short, the existing exidence of predatory intent has only some limited weight as corroborative circumstantial evidence of Frito-Lay's predatory intent. Standing by itself, the intent evidence is wholly insufficient to establish Frito-Lay's predatory intent.

E. Price and Promotional Discrimination

Jays provide some evidence that Frito-Lay ran promotions featuring price discounts longer in Chicago than in other markets and generally devoted more merchandising resources to the zone of which Chicago was a part (Ex.49, p.169529; Ex.65). Even if true, these things do not necessarily indicate predatory pricing. The same principles that apply to Jays' product maximization and profit price cross-subsidization arguments apply in this in-

stance. So long as Frito-Lay priced potato chips above its average variable cost and its long-run incremental cost, then there is no compelling reason to deny Chicago consumers the benefits of longer and greater promotional discounts. While the social benefits of increased advertising might be debated, there is nothing inherently predatory about heavy advertising in highly competitive markets.

V.

Courts generally approach summary disposition of complex antitrust cases with caution. *See Lupia v. Stella D'Oro Company, Inc.*, 586 F.2d 1163 (7th Cir.), *cert. denied*, 440 U.S. 982 (1979). This is especially true in antitrust cases where motive and intent play leading roles. *Feldman v. Health Care Service Corp.*, 562 F.Supp. 941 (N.D. Ill. 1982). If, however, after completion of discovery it is clear that the plaintiff will not be able to establish an essential element of its claim, summary judgment in defendant's favor is warranted. *Products Liability Insurance Agency, Inc. v. Crum & Forester Insurance Companies*, 682 F.2d 660 (7th Cir. 1982).

The parties have completed discovery and filed a massive pretrial order. If the court denies Frito-Lay's motion for summary judgment the parties will go to trial using exactly the same body of evidence that they have drawn upon for their briefs. This trial is optimistically estimated to last six weeks. It will expose Frito-Lay to treble damages.

Jays simply has failed to make out even the outlines of a case of predatory pricing, *MCI* makes clear that an essential element of a predatory pricing case is proof that

defendant's prices were below average variable or long-range incremental costs. After completing its discovery and after having many months to send legions of experts through the thickets of cost data, plaintiff has failed to come close to satisfying either cost standard. In fact, to the extent it is usable, the available cost data indicates that Frito-Lay's pricing policy was not predatory.

Jays rests its case upon the legal proposition that non-cost evidence can support a predatory pricing claim. A weak pricing case can perhaps be rescued by convincing non-cost evidence. But here plaintiff's pricing data is anemic at best and its non-cost evidence is unilluminating.

Because it is based largely upon empirical factors, predatory pricing analysis does not depend upon considerations of motive and intent. That barrier to summary judgment is thus not at issue. Now that the pretrial order is entered there is no possibility that Jays can divine cost figures or uncover non-cost evidence that reveals predatory pricing. Even though it has made a Herculean effort, Jays has advanced a case that rests largely upon speculation and conjecture. In order to avoid presenting a jury with such a case, the court has no option under the circumstances but to grant Frito-Lay's motion for summary judgment.

VI.

Count II is brought under the Robinson-Patman Act, 15 U.S.C. § 13(a), which provides that

> it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such

> commodities are sold for use, consumption, or resale . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

Plaintiff moves for summary judgment on that count.

There are three contested issues with respect to Jays' Robinson-Patman Act claim: whether Frito-Lay (1) discriminated in price; (2) in the sale of goods of like grade and quality; (3) such that competition was substantially lessened. Plaintiff's motion is directed only at the first two issues. For purposes of the motion Jays focuses only on the sale in the Chicago market of supermarket-sized products within the categories of (1) Lays/Frito-Lays; (2) Ruffles; and (3) flavored potato chips.

The extent to which a product is of like grade and quality as another product depends on "the characteristics of the product itself." *FTC v. Borden Co.*, 383 U.S. 637, 641 (1966). In *Borden* the court held that evaporated milk produced and sold under the Borden name was of like grade and quality as that which Borden produced for sale at lower prices under other brand names. The physical and chemical identity of the two products, rather than brand names and consumer preferences, are conclusive of the like grade and quality question. *Id.* at 639-640.

Defendant emphasizes the physical differences between the various lines of Frito-Lay products marketed in Chicago and throughout the country. The likeness of grade and quality of, for example, a plain potato chip and a flavored ridged potato chip presents a genuine issue of fact which cannot be resolved upon a motion for summary judgment. *See Checker Motors Corp. v. Chrysler Corp.*, 283 F.Supp. 876, 888-89 (S.D.N.Y. 1968), *aff'd* 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 994 (1969). Jays' motion, as this court understands it, is directed instead towards

establishing only that the various lines of supermarket-sized Frito-Lay products sold in Chicago were substantially identical to the same items Frito-Lay sold in the same supermarket-sized packages outside of Chicago. So, for example, barbecued potato chips sold in supermarket-sized packages in Chicago are substantially identical to barbecued potato chips sold in supermarket-sized packages elsewhere, but not substantially identical to ridged potato chips sold in supermarket-sized packages. The evidence supports this rather unremarkable proposition.

Price discrimination under the Robinson-Patman Act "is merely a price difference." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). Jays has advanced evidence that Frito-Lay prices for its supermarket-sized products were sometimes lower in the Chicago market than elsewhere. Frito-Lay provides evidence that its prices were sometimes higher in Chicago than elsewhere. Frito-Lay also argues that the price differentials were simply inherited from the local companies which it absorbed. *See Dean Milk Company v. FTC*, 395 F.2d 696, 700-03 (7th Cir. 1968). Summary disposition of this issue is unwarranted in view of the uncertainty of the data. It would seem, however, that the parties ought to be able to agree on historical pricing data, thus eliminating the need for evidence on that issue, and perhaps on post-1978 promotional campaign discounts.

Conclusion

Defendant's motion for summary judgment on Count I is granted. Plaintiff's motion for summary judgment on Count II is granted in part within the parameters as set out in the opinion. Defendant's motion for summary judgment on the Count II price discrimination issue is denied.

JAMES B. MORAN

JAMES B. MORAN
Judge, United States District Court

August 1, 1985.

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAYS FOODS, INC., a corporation,
Plaintiff,

vs.

FRITO-LAY, INC., a corporation,
Defendant.

No. 78 C 4352

MEMORANDUM AND ORDER

Plaintiff has moved pursuant to Rule 54(b) of the Federal Rules of Civil Procedure for reconsideration and vacation of this court's August 1, 1985 order granting defendant's motion for summary judgment as to count I.

The August 1, 1985 memorandum and order came after the parties had completed discovery and filed a final pretrial order. The parties briefed the summary judgment issue very thoroughly and well. It was apparent to the court that both sides had a good grasp of both the applicable law and an extremely large and tangled record. In reaching its decision the court was confident that each position was well supported by strong lawyering.

In its opinion the court dealt with plaintiff's contentions one-by-one. Such an approach was necessitated by the scope of plaintiff's claim and the expansiveness of the record. The court did not, however, forget the nature of plaintiff's case. It understood that plaintiff was not complaining of a series of discrete instances of

anticompetitive predatory conduct but rather of a system of unlawful anti-competitive behavior that stretched over many years.

In fact, it was precisely the adoption of plaintiff's approach that prompted the court to conclude that plaintiff, after full discovery, simply did not have enough evidence to create a triable issue on its count I claim. The heart of the court's opinion is an examination of plaintiff's contentions. The court found that the data about defendant's pricing policy was somewhat fragmentary and did not point towards predatory pricing. The non-price evidence was similarly devoid of substantial evidence supporting plaintiff's claim that defendant intentionally designed and implemented an anti-competitive system that included pricing and numerous marketing and sales components, covered a large metropolitan market and lasted for years.

In its motion to reconsider, plaintiff defends a radically scaled-down version of its case. As to the treatment of non-price contentions, plaintiff makes only one direct challenge, alleging that the court did not give weight to evidence that defendant sold below its short-run marginal cost during its potato chip promotions. In its opinion the court noted, however, that the evidence presented by *plaintiff* strongly indicated that defendant did not price below its short-run marginal cost. This data was broken down into four week periods and did not reveal a pattern of pricing below short-run marginal cost that corresponded to promotional periods.

Apparently accepting the court's conclusions about short-run marginal cost, plaintiff also argues that the court improperly rejected a study purporting to establish that defendant priced below its long-run incremental cost. This study is simply a record of defendant's fully-

distributed costs of producing potato chips in the zone that included Chicago, with cost of capital figures tacked on. As the court noted in its opinion, this revised study is inherently of questionable accuracy.

The Seventh Circuit has reiterated that pricing below average variable cost is normally one of the most relevant indications of predatory pricing. *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1115 (7th Cir.), *cert. denied* 104 S.Ct. 234 (1983). The evidence which the parties have developed after years of litigating does not support a claim on that basis. In *MCI*, the court adopted a long-run incremental cost approach as a means of defining average total cost because that was the approach adopted by both parties. It made clear, however, that fully distributed costs were not the same as long-run incremental costs and were not normally a proper measure of average total costs to determine predatory pricing, and, further, that long range incremental costs were most appropriately a measure of costs of new products or services, especially when the goods or services were in capital-intensive industries where growth of plant and equipment is marked. *Id.* at 1115-16. One would there expect a rational economic pricing decision to relate more to expectable capital costs and less to imbedded historical costs.

By no stretch of the imagination can the production of potato chips be described as high-tech industry. Potato chips are a conventional consumer food product in a multiproduct industry with some continuing capital investment. It is pressing a bit to contend that the pricing of potato chips should be viewed from a standard that essentially equates all costs, including capital costs, as variable. When even that model rests upon the uncertain foundation of a fully distributed costs analysis, with capital costs merely tacked on, we have moved from the

realm of reasonably permissible inferences to the realm of speculation. A brief affidavit filed after the decision in this case saying that isn't necessarily so is not enough to revive plaintiff's claim even were it considered. Pricing decisions which do not reflect substantial capital costs in a new and rapidly expanding market may well be suspect. If pricing decisions in an established market are likewise suspect if they do not recover all costs, including prior capital investment, then pricing above average variable costs would permit a conclusion of predatory pricing. But that is not what the cases hold, nor is such a conclusion consistent with economic reality.

The issue thus becomes whether the earlier reworking by plaintiff of defendant's fully distributed cost analysis should be enough to defeat summary judgment when plaintiff, after full discovery, has otherwise failed to establish even the outlines of an alleged system of anti-competitive conduct. The court believes that granting summary judgment under the circumstances was and is appropriate.

As this court's decision indicated, much of plaintiff's argument rests upon inferences which are at best no more reasonable than contrary inferences and others which are, in many instances, highly attenuated. The statistical data to be presented at trial in many instances provides an uncertain basis for drawing any meaningful conclusion. Discovery has long been closed. The plaintiff has the burden of proof. The mosaic which plaintiff presents, in the context of all the evidence, would leave the jury to speculate that there may have been predatory pricing but without sufficient proof, even after viewing the evidence most favorably to plaintiff, that such a conclusion could reasonably be reached as more likely than not. And that is not sufficient. *See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 54 L.W. 4319 (S.Ct. 3/26/86).

As can be seen, the court's grant of summary judgment is not inconsistent with plaintiff's theory of the case, but rather follows from it. Plaintiff's motion to reconsider and vacate the August 1, 1985 order is accordingly denied.

JAMES B. MORAN

JAMES B. MORAN
Judge, United States District Court

March 31, 1986.

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAYS FOODS, INC., a corporation,
Plaintiff,

vs.

FRITO-LAY, INC., a corporation,
Defendant.

No. 78 C 4352

MEMORANDUM AND ORDER

On August 1, 1985 this court granted defendant's motion for summary judgment on count I, holding that there was insufficient evidence, after full discovery, to raise a triable attempted monopolization issue. The court there did not wholly reject reliance on evidence of subjective predatory intent, if there were such, although it emphasized predatory pricing as the key issue and its analysis was primarily focused on the relevant cost measurement. Plaintiff tried again, with a motion for reconsideration. That was rejected on March 31, 1986, with this court again emphasizing cost measurement standards.

Defendant followed with a motion for summary judgment on the remaining two counts. The thrust there was that the Robinson-Patman claim must also be rejected because it too requires predatory pricing analyzed on the same basis as a Section 2 Sherman Act claim. Rather than require full briefing this court suggested that the parties

file position papers setting forth what they expected to be able to demonstrate to the court if the issues were fully explored, and they have done so. This court thereafter delayed ruling until it had an opportunity to explore generally the law applicable to Robinson-Patman Act claims, an area with which it had little familiarity. Having done so, this court now grants defendant's motion for summary judgment on count II and denies it on count III.

Plaintiff claims that this court was wrong the first time and, if it wasn't, at least the predation standard for a Robinson-Patman claim is different from that applicable to a Section 2 claim. It rests upon *Utah Pie Co. v. Continental Baking Company*, 386 U.S. 685 (1967), and reargues many of its prior contentions.

Utah Pie is a slender reed upon which to rely. The development of the law has not been kindly to the plaintiff since this case was filed and, if anything, it has been even less kindly since the 1985 opinoin here. The "modern era of predatory pricing analysis . . . ushered in by Professors Areeda and Turner" *(Jays Foods, Inc. v. Frito-Lay Inc.*, 614 F.Supp. 1073, 1076 (N.D. Ill. 1985)) was eight years after *Utah Pie*. If *Utah Pie* ever meant that a Robinson-Patman violation can rest upon pricing above an appropriate cost measurement, it has been soundly criticized. *See* Bork, *The Antitrust Paradox*, pp.386-387 (1978); Areeda & Turner, *Antitrust Law*, ¶ 720c, pp.189-190 (1978); ABA Antitrust Section, Monograph 4, *The Robinson-Patman Act: Policy and Law, Volume I*, p.77 (1980). But if it once meant that, it means it no longer. It is illuminating that, with respect to a Sherman Act claim, the Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ____, 106 S.Ct. 1348 (1986), defined predatory pricing as chiefly a problem of a single firm, having a dominant share of the relevant market, cutting its prices in order to force competition out

of the market, with predatory pricing meaning pricing below some appropriate measure of cost. It declined, in that case, to resolve the debate over what cost measurement is relevant (fn.8, p.1355). The Court relied, however, on cases which had emphasized objective pricing and incremental cost data, referred to *Utah Pie* as generally supporting that proposition, and indicated (in fn.9) that any theory based upon pricing above an appropriate cost measurement was vulnerable. A similar shift in emphasis is echoed in *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d. 1325 (7th Cir. 1986) ("So 'intent to harm rivals' is not a useful standard in antitrust" (p.1338). "[A] dominant firm may slash prices to marginal cost in an effort to capture patronage" (p.1339). "The focus must be on the objective basis, not the mental state" (*id.); see also Olympia Equipment Leasing Company v. Western Union Telegraph Company*, 797 F.2d 370 (7th Cir. 1986) and *The Great Escape, Inc. v. Union City Body Company, Inc.*, 791 F.2d 532 (7th Cir. 1986). Finally, *Matsushita* was a forerunner of *Anderson v. Liberty Lobby, Inc.*, 476 U.S. ____, 106 S.Ct. 2505 (1986) and *Celotex Corp. v. Catrett*, 476 U.S. ____, 106 S.Ct. 2548 (1986), where the Supreme Court made it clear that summary judgment is a useful tool when the party having the burden of proof cannot sustain its burden after full discovery.

Indeed, the rapid development of the law is well illustrated by one treatise. Von Kalinowski, *Antitrust Laws and Trade Regulation*, ch. 29, vol. 4, dealing with competitive injury under the Robinson-Patman Act, appears to have been largely written in 1969 and somewhat revised in 1979. Ch. 10, vol. 3, dealing with predatory practices, appears to have been substantially rewritten in 1985 and discusses fully the differing approaches of the various circuits in the post-Areeda & Turner era. There is an almost total lack of congruency between the chapters.

In ch. 10 (10-25, § 10.03(5)), fn. 48, Von Kalinowski notes that *Utah Pie* probably has little present relevance since it predated the "recent flood of predatory pricing writing precipitated by Areeda & Turner's proposal and before a large amount of litigation on the issue. There is a different context of common law and economic theory that the Supreme Court must now consider."

Courts have been unwilling to drop intent as a standard entirely, perhaps because of an understandable reluctance to never say never when the universe is unpredictable, perhaps in deference to the past, or perhaps in recognition that commercial megalomania, even without market power, is, still, without redeeming virtue. *But see Barry Wright Corporation v. ITT Grinnell Corporation*, 724 F.2d 227 (1st Cir. 1983). Some courts have been unwilling, also, to follow the logic of an objective predation standard. They have, rather, noted that predatory pricing can lead to an inference of predatory intent which can lead to an inference of the requisite possible effect on competition, *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) or to an inference of a dangerous probability of success in attaining monopolization, *Janich Bros. Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). The relevant cost measurements remain, as the Supreme Court noted, the subject of intense debate, with factors such as entry barriers relevant to that debate.

Where does that leave a Robinson-Patman price discrimination claim? The answer is, in one sense, unclear. The statute imposes liability not for price discrimination but illegal price discrimination, and that requires a possible impact on competition (not just on a competitor, *Henry v. Chloride, Inc.*, ____ F.2d ____, Nos. 85-2394,

85-2446, slip op. (8th Cir. Jan. 20, 1987)). That is, by its terms, different from the monopolization standard of dangerous probability of success. But if predatory pricing leads inexorably to a presumed danger of monopolization (and, obviously, a presumed threat), the focus necessarily is on the predation standard, at least in primary-line injury cases. And the courts and commentators are now in virtual agreement that the predation standards for Section 2 and Robinson-Patman claims are the same, even though they may disagree over what the standards may be. *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., supra; see International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Defendant here concedes that market analysis may establish a Robinson-Patman violation even in the absence of predation, and certainly the Seventh Circuit has so stated in *Lloyd A. Fry Roofing Co. v. FTC*, 371 F.2d 277, 282 (7th Cir. 1966), a refrain repeated in some more recent cases such as *Double H. Plastics, Inc. v. Sonoco Products Company*, 732 F.2d 351 (3rd Cir.), *cert. denied*, 469 U.S. 900 (1984), and *Henry v. Chloride, Inc., supra*, slip op. at 12. This court confesses to being highly uncertain what that means, if anything. A more efficient enterprise using, for example, some new technology, might be able to make a profit at prices below all its competition in one market and drive them from it, while charging a higher price in another market. It can be argued that that is competition, not predation, and that the antitrust laws do not condemn that price benefit to consumers, at least so long as insurmountable entry barriers do not create a continuing monopoly. If that enterprise raises prices

later, its competitors can return (as they also can if they become more efficient).

This court has already concluded that the evidence does not support a claim of predatory pricing here and that should end the matter. Plaintiff again contends that in some weeks it can show pricing below a relevant cost measurement, but no matter how the standard is verbalized such transitory fluctuations are not violations. They do not support a presumed intent, as they do not suggest an intent to drive competition from the marketplace and then raise prices to more than recapture past losses. They do not prove a possible substantial impact on competition, much less a dangerous probability of monopolization. Brief under-cost pricing hardly establishes the monopoly staying power with which Section 2 concepts, at least, are concerned.

But even if a market analysis is relevant in the absence of predation plaintiff does not indicate in a meaningful way why it would be relevant here. Plaintiff does not contend that the parties are in a capital-intensive, high technology industry. It argues that shelf space once lost is difficult to regain. Despite its continuing references to high entry barriers plaintiff does not, however, appear to suggest that defendant could, if dominant, charge monopoly prices and continue to exclude competitors for any extended period. At most, it contends that inertia in allocating shelf space will delay somewhat the entry of a competitor with products of equal quality and lower prices. It is difficult to see how that supports an argument that defendant's pricing could be predatory because it was rational only if losses could be recouped by subsequent extended monopoly pricing. "If the price-cutter cannot dominate—if other rivals can with reasonable ease take the place of any competitors knocked out—competition is not seriously or permanently dam-

aged." *Henry v. Chloride, Inc., supra,* slip op. at 21. Plaintiff contends that defendant has a dominant position in the Chicago market for snack foods other than potato chips, which it protects by potato chip price discrimination, and that in recent years plaintiff has lost and defendant has gained market share. But that is a far cry from a drastically declining price structure or some other change in the market from which a threat to competition could be argued even if we assume that a threat without predation is a violation. Plaintiff's case rests, ultimately, upon an expansive view of *Utah Pie,* and that view is unwarranted.

That leaves, then, count III. Plaintiff there asserts claims under the state antitrust laws of Illinois, Indiana, Michigan and Wisconsin, and under the Illinois Uniform Deceptive Practices Act, the Illinois Consumer Fraud and Deceptive Business Practices Act and the Wisconsin Fraudulent Advertising Statute. Defendant initially contended that these state law claims fall if it prevailed on the federal claims because they are pendent. Plaintiff points out, however, that there is complete diversity, and defendant has apparently abandoned that contention. Conversely, plaintiff does not contend that state antitrust statutes give it a claim even though federal law does not, and it does not now urge that it is entitled to relief under the Wisconsin Fraudulent Advertising Statute. It argues, however, that there are triable issues under both Illinois statutes. Unfortunately, both parties have treated the state law claims in their memoranda as very much an afterthought. Indeed, plaintiff's one case citation was to a 1946 New York case. This court notes that in plaintiff's statement of contested issues in the final pretrial order it makes no reference to any state law claims. On the other hand, it has expressly abandoned only some of the state law claims advanced in paragraph 20 of the First

Amended Complaint, those being subparagraphs (c), (d), (e), (g), (i), (j) and (l). Further, some of the subparagraphs are essentially price discrimination claims, and those are now foreclosed. Those are subparagraphs (a) and (b).

That leaves, then, claims that defendant engaged in advertising and promotional practices directly tied to the allocation of increased shelf space, had a program of acquisitions and mergers to forestall entry and lessen competition and illegally induced store buyers and the like to allocate additional shelf space and product "and/or excluding other competitors' products." We assume that plaintiff does not contend that acquisitions and mergers have anything to do with the Illinois statutes. Although it is far from clear, plaintiff is apparently claiming that defendant on occasion bought additional shelf space, used false sales figures to get a larger allocation, and made various misrepresentations. Without, however, a more specific understanding of what claims remain, it is difficult for the parties to argue, and for this court to determine, their legal sufficiency under state law. The motion for summary judgment on count III is, therefore, denied, not because it is without merit but because this court cannot presently determine what merit it may have.

JAMES B. MORAN

JAMES B. MORAN
Judge, United States District Court

February 26, 1987.

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAYS FOODS, INC., a corporation,
Plaintiff,

vs.

FRITO-LAY, INC., a corporation,
Defendant.

No. 78 C 4352

MEMORANDUM AND ORDER

Plaintiff Jays Foods, Inc. filed this action in 1978. It was primarily an antitrust case consisting of predatory pricing claims under section 2 of the Sherman Act, 15 U.S.C. § 2, and price discrimination claims under the Robinson-Patman Act, 15 U.S.C. § 13(a). Two successful summary judgment motions by the defendant, Frito-Lay, Inc., disposed of these federal antitrust claims. *Jays Foods, Inc. v. Frito-Lay, Inc.*, 614 F.Supp. 1073 (N.D. Ill. 1985) (no triable issue concerning Sherman Act claim). 635 F.Supp. 103 (N.D. Ill. 1986) (motion for reconsideration denied), 656 F.Supp. 843 (N.D. Ill. 1987) (no triable issue concerning Robinson-Patman Act claim). All that remains are Jays' claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (the "Consumer Fraud Act"), Ill.Rev.Stat. ch. 121-1/2, ¶ 262 *et seq.*, and the Illinois Deceptive Trade Practices Act, Ill.Rev.Stat. ch. 121-1/2, ¶ 311 *et seq.*, which have received scant attention until Frito-Lay filed this summary judgment motion shortly before trial. The trial date was vacated

and Frito-Lay's summary judgment motion is now granted.

REMAINING CLAIMS

Jays' remaining claims relate to subparagraphs 20(f) and (k) of its amended complaint. In subparagraph 20(f) plaintiff alleges that Frito-Lay is

> [e]ngaging and continues to engage in advertising and promotional practices which are directly tied to retailer's allocation of additional shelf space to Frito-Lay products to forestall market entry and lessen competition.

Subparagraph 20(k) charges Frito-Lay with

> [i]llegally and improperly inducing store buyers and similarly situated personnel to give defendant additional shelf space, additional authorization for its products and/or excluding other competitors' products.

These allegations closely resemble the shelf space allegations in Jays' antitrust claims.

Jays intended to show at trial that Frito-Lay attempted to influence the allocation of retail shelf space by engaging in several unfair and deceptive practices. First, Jays would show that Frito-Lay urged retailers to allocate shelf space based on total snack food sales but it failed to use the shelf space it gained that way in a profit maximizing manner. For example, Frito-Lay devoted all newly gained space to its comparatively slow-selling regular potato chips. Second, Jays would show that Frito-Lay gained additional shelf space by presenting retailers with misleading and incomplete shelf space studies. For example, one such study, Frito-Lays' "mini-analysis," examined only total sales of snack foods, ignoring other

variables such as profits, inventory turnover, location and service. Jays also would show that Frito-Lay stacked its products at the front of retail shelves, leaving unused space behind ("dummying up"), and left more of its products in certain stores than sales justified, moving them to stores with higher inventory turnover only just in time to prevent them from going stale ("rolling stock"). Jays contends that these practices enabled Frito-Lay to occupy excessive shelf space at the expense of Frito-Lay's competitors, such as Jays.

Third, Jays would show that Frito-Lay engaged in promotional programs directly tied to the allocation of additional shelf space, a practice that Jays characterizes as "buying space." Finally, Jays would show that Frito-Lay took steps to skew sales when retailers were conducting shelf space tests to protect its shelf space allocations.

DISCUSSION

The course of events has somewhat skewed the present dispute. The final pretrial order was filed in 1982, after discovery had been closed. That order, which was to govern the issues to be tried and listed the witnesses and exhibits, largely ignored the state law claims. After the summary judgments on the antitrust claims this court determined that the two state law claims remained, a very small tail on what had been a large and now dead dog. We assumed, on the basis of what had been previously represented, that plaintiff might be claiming, for example, that it had been excluded from some supermarket or convenience store chain for a time or had its shelf space reduced by such an enterprise, all because of defendants conduct and that plaintiff would point to reduced sales to those enterprises as a result. The issues would be, in those circumstances, factual and legal—whether there was conduct which led to provable loss of sales and whether that

conduct was illegal. A trial of those remaining narrow issues was contemplated to be short, resulting in a final judgment which would permit appeal of the antitrust decisions.

Plaintiff now claims that the passage of time nullifies the restrictions of the final pretrial order. It seeks to introduce evidence of everything which has happened since discovery closed for the purpose of ascribing to defendant's shelf space conduct the claimed difference between plaintiff's value at the beginning of 1984 (based on the sales price of the company in 1986) and what the value could have been. The amounts claimed exceed those of the antitrust claims. Defendant quite reasonably argues that plaintiff is seeking to litigate a new and different lawsuit about which there has been no discovery. We do not, however, reach that question because we conclude that the conduct of which plaintiff now complains does not create triable issues under Illinois law. Frito-Lay argues that the record shows there are no triable issues as to (1) the alleged violations of either of the two Illinois statutes Jays relies on; (2) the causation of Jays' claimed injury; and (3) Jays' theory of damages. Because Frito-Lay's first argument is persuasive, there is no need to examine the others.

Jays devotes a surprising amount of attention to the Illinois Deceptive Trade Practices Act. Section 2 of the Act, Ill.Rev.Stat. ch. 121-1/2, ¶ 312, lists the kinds of conduct covered in twelve subparagraphs. The first eleven subparagraphs apply to specific kinds of deceptive conduct, such as passing-off, trademark infringement and false advertising. None of those subparagraphs is at issue here. Jays relies on subparagraph 2(12), Ill.Rev.Stat. ch. 121-1/2, ¶ 312(12), which prohibits "conduct which similarly creates a likelihood of confusion or misunder-

standing." The only conduct by Frito-Lay that might fit within that subparagraph is its alleged use of misleading shelf space studies, or perhaps its efforts to skew retailers' own shelf space studies. Because the Deceptive Trade Practices Act only applies to false or misleading conduct concerning goods or services, it does not apply to Frito-Lay's other non-deceptive conduct. *See Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 328, 13 Ill.Dec. 699, 703, 371 N.E.2d 634, 638 (1977); Ill.Rev.Stat. ch. 121-1/2, ¶ 311 Prefatory Illinois Notes (the Act deals with "false, concealing, or deceptive trade identification, and false, confusing, or deceptive representations as to the source or origin of goods.").

But the Deceptive Trade Practices Act only provides for injunctive relief, plus costs and attorneys' fees in appropriate circumstances. Ill.Rev.Stat. ch. 121-1/2, ¶ 313. Although Jays' original complaint in this action mentioned injunctive relief, this case has proceeded as a damage action since then. Neither the final pretrial order nor plaintiff's statement of issues to be tried indicate that anything other than damages is sought now. Because there is no damage remedy under the Deceptive Trade Practices Act, Frito-Lay is entitled to summary judgment on that part of Jays' claim.

If Jays is to recover damages it must proceed under the Consumer Fraud Act, which provides:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act" ... are hereby declared unlawful

> whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

Ill.Rev.Stat. ch. 121-1/2, ¶ 262; *see* Ill.Rev.Stat. ch. 121-1/2, ¶ 270a (providing for a private damage action).

The Consumer Fraud Act incorporates Section 2 of the Deceptive Trade Practices Act by reference, but it is considerably broader. Like the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, the Consumer Fraud Act applies to "unfair methods of competition." Unfair methods of competition include violations of the federal antitrust laws. *See, e.g., E. I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 136-37 (2d Cir. 1984). However, Jays cannot proceed on an antitrust theory because of Frito-Lay's earlier successful summary judgment motions. Except for the possible violations of the Deceptive Trade Practices Act, Jays must show that Frito-Lay's shelf space practices were unfair even though they did not violate the antitrust laws.

The Consumer Fraud Act is, by its terms, wide-ranging. In interpreting it, consideration shall be given to interpretations of the Federal Trade Commission Act, but the decision as to what is "unfair" is left to juries and the courts rather than to an administrative agency having experience and expertise.[1] Perhaps for this reason the

[1] Consumer Fraud Act claims are frequently tried before a jury. *See, e.g.*, Warren v. LeMay, 142 Ill.App.3d 550, 572-73, 96 Ill.Dec. 418, 432, 491 N.E.2d 464, 478 (5th Dist. 1986); Tague v. Molitor Motor Co., 139 Ill.App.3d 313, 93 Ill.Dec. 769, 487 N.E.2d 436 (5th Dist. 1985). However, the only court to face the issue held that the Consumer Fraud Act does not provide for jury trials. Richard/Allen/Winter Ltd. v. Waldorf, No. 2-86-0119 (2d Dist. June 10, 1987).

Illinois courts have moved cautiously in fleshing out the contours of the Act. *See Evanston Motor Co. v. Mid-Southern Toyota Dist., Inc.*, 436 F.Supp. 1370, 1374 n.4 (N.D. Ill. 1977); *Frahm v. Urkovich*, 113 Ill.App.3d 580, 586, 69 Ill.Dec. 572, 576, 447 N.E.2d 1007, 1011 (1st Dist. 1983) ("we do not interpret the liberal construction requirements to mean that liability under the Act is completely open-ended"). No Illinois case appears to have extended liability under the Consumer Fraud Act to the kind of conduct at issue here. Although the Illinois courts have often stated that unfair practices under the Consumer Fraud Act must be defined on a case-by-case basis, *e.g.*, *Scott v. Ass'n for Childbirth at Home, Int'l*, 88 Ill.2d 279, 290, 58 Ill.Dec. 761, 767, 430 N.E.2d 1012, 1018 (1982), this court, as a federal court sitting in diversity jurisdiction, must be particularly hesitant to push the frontiers of state law. *See, e.g., Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 942 (7th Cir. 1986); *Zick v. Verson Allsteel Press Co.*, 623 F.Supp. 927, 930 (N.D. Ill. 1985).

In this action Jays has failed to develop any evidence showing that consumers are injured by Frito-Lay's conduct. The Illinois courts have limited liability under the Consumer Fraud Act to conduct that implicates consumer protection concerns. *See, e.g., Feldstein v. Guinan*, 148 Ill.App.3d 610, 615, 101 Ill.Dec. 947, 951, 499 N.E.2d 535, 539 (1st Dist. 1986) ("the Act does not redress purely private wrongs but is for practices which affect the public generally"); *Frahm*, 113 Ill.App.3d at 586, 69 Ill.Dec. at 576, 447 N.E.2d at 1011 ("the Act is intended to reach practices of the type which affect consumers generally and is not available as an additional remedy to redress a purely private wrong"); *see also M & W Gear Co. v. AW Dynamometer, Inc.*, 97 Ill.App.3d 904, 915, 53 Ill.Dec. 721, 731, 424 N.E.2d 356, 366 (4th Dist. 1981) (Webber, J., dissenting) ("the emphasis is on the consumer and the

apparent purpose is an effort to equalize economic power as between consumers and predators in the business world").

Several federal courts in this district, including this court, have followed that limitation. *See, e.g., Horsell Graphic Industries, Ltd. v. Valuation Counselors, Inc.*, 639 F.Supp. 1117, 1122 (N.D. Ill. 1986); *Heritage Ins. Co. v. First Nat'l Bank*, 629 F.Supp. 1412, 1419 (N.D. Ill. 1986); *Newman-Green, Inc. v. Alfonzo-Larrain R.*, 590 F.Supp. 1083, 1086-88 (N.D. Ill. 1984). The Illinois Supreme Court has not squarely faced the issue, but its decisions also support limiting liability under the Consumer Fraud Act to conduct that deceives or exploits consumers. *See Scott v. Ass'n for Childbirth at Home, Int'l*, 88 Ill.2d at 285, 58 Ill.Dec. at 764, 430 N.E.2d at 1015 (Consumer Fraud Act applies to advertising and sale of educational and training services because "purchasers of educational services may be in as much need of protection against unfair or deceptive practices in their advertising and sale as are purchasers of any other service"); *Steinberg v. Chicago Medical School*, 69 Ill.2d at 328, 13 Ill.Dec. at 703, 371 N.E.2d at 638 (rejected medical school applicants could not sue under the Consumer Fraud Act because they were not consumers). The limitation does not prevent businesses from suing under the Consumer Fraud Act, but injury to consumers is an essential element of such a claim. *See, e.g., Newman-Green, Inc.*, 590 F.Supp. at 1087-88.

The Illinois courts have not uniformly formulated this consumer injury limitation and some courts have stated that it does not apply. *See, e.g., M & W Gear*, 97 Ill.App.3d at 913-14, 53 Ill.Dec. at 730, 424 N.E.2d at 365.[2] However,

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[2] Other Illinois cases have headed in the opposite direction, stating that only consumers have standing to sue under the Consumer Fraud Act. *See, e.g.*, McCarter v. State Farm Mutual Automobile Ins. Co., 130 Ill.App.3d 97, 101, 85 Ill.Dec. 416, 419, 473 N.E.2d 1a015, 1018 (3d Dist. 1985); Carter v. Mueller, 120 Ill.App.3d 314, 322, 75 Ill.Dec. 776, 783, 457 N.E.2d 1335, 1342 (1st Dist. 1983).

those cases have either involved consumer plaintiffs or conduct from which injury to consumers could be readily inferred. In *M & W Gear* the plaintiff successfully sued a competitor for false advertising. On appeal, the defendant argued that the plaintiff had failed to plead or prove any adverse effect on the public. The court rejected any public injury requirement and affirmed judgment for the plaintiff. However, as the court in *Newman-Green* observed, the *M & W Gear* court could easily have held that false advertising gives rise to a conclusive presumption of public injury to consumers. 590 F.Supp. at 1087 (citing *Evanston Motor Co.*, 436 F.Supp. at 1374 n.6). In *Tague v. Molitor Motor Co.*, 139 Ill.App.3d 313, 316, 93 Ill.Dec. 769, 770-71, 487 N.E.2d 436, 437-38 (5th Dist. 1985), the court rejected a public injury requirement, but there the plaintiff was a consumer complaining of odometer tampering and other misconduct in connection with the sale of a used car. In *Duncavage v. Allen*, 147 Ill.App.3d 88, 102, 100 Ill.Dec. 455, 463, 497 N.E.2d 433, 441 (1st Dist. 1986), the court concluded that a tenant was a consumer under the Consumer Fraud Act, and relied on *Tague* in allowing a suit on behalf of a deceased tenant against a landlord.

Similarly, the court in *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 647 F.Supp. 1026, 1034-35 (N.D. Ill. 1986), rejected any public injury requirement, but that was a class action by commercial borrowers against a bank. The plaintiffs were in the same position as consumers with respect to their loans, and the alleged misconduct involved deceptive practices addressed to a broad segment of the bank's market. *See Exchange Nat'l Bank v. Farm Bureau Life Ins. Co.*, 108 Ill.App.3d 212, 216, 63 Ill.Dec. 884, 887, 438 N.E.2d 1247, 1250 (3d Dist. 1982) (holding that plaintiff borrowers had no Consumer Fraud Act claim "[i]n the absence of an allegation indicating such [deviant business] practices to be part of a pattern of

defendant's lending activities..."). Thus *Haroco*, like *M & W Gear* on which it relied, may rest on an unnecessarily broad ground.

This court concludes, as it did in *Horsell*, that some consumer injury is an essential element of any claim under the Consumer Fraud Act. Perhaps where the plaintiff is a consumer, no further public injury need be shown. But where a suit is between competitors, as it is here, a plaintiff must show that the defendant's misconduct injured consumers generally. *See Hangstefer v. Insco*, No. 86 C 1022 (N.D. Ill. May 14, 1987); *Maduff v. Life Ins. Co.*, 657 F.Supp. 437, 440 (N.D. Ill. 1987) (both noting the apparent split in Illinois authority and concluding that allegations of public injury or effect on consumers generally are necessary to state a claim under the Consumer Fraud Act).

Although the consumer injury requirement is an independent element of any Consumer Fraud Act claim, including claims based on the incorporated Deceptive Trade Practices Act violations, it is similar in some respects to the issue of unfairness. The consumer injury requirement developed in part from concepts applied in determining whether a trade practice is unfair under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. *See, e.g., Evanston Motor*, 436 F.Supp. at 1374. A practice that is neither a violation of the antitrust laws nor deceptive may still be unfair under section 5 if it offends some established public policy, if it is immoral, unethical, oppressive or unscrupulous, or if it is substantially injurious to consumers. *Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 (7th Cir. 1978) (citing *FTC v. Sperry Hutchinson & Co.*, 405 U.S. 233, 244-45 & n.5 (1972)); *see Scott v. Ass'n for Childbirth at Home, Int'l*, 88 Ill.2d at 290, 58 Ill.Dec. at 767, 430 N.E.2d at 1018 (citing *Spiegel* and *Sperry Hutchinson* with approval in defining unfair practices

under the Consumer Fraud Act). The Federal Trade Commission has further refined the concept of unfairness under the FTC Act, clarifying that its primary focus is consumer injury; the public policy theory is used mainly to cross-check and confirm a finding of consumer injury, and the theory of immoral or unscrupulous conduct was abandoned altogether as an independent basis of liability. *See, e.g., International Harvester Co.*, 104 F.T.C. 949, 1060-61, 1070-76 (1984).

As the *Evanston Motor* court recognized, consumer injury under the Consumer Fraud Act can take two forms. Violations may affect consumers directly or indirectly by affecting competition. The plaintiff here has not attempted to set forth any evidence of a direct injury to consumers. Frito-Lay's alleged misconduct was directed to retailers, not to consumers. Further, although plaintiff contends that consumer's purchasing decisions were affected by changes in shelf space allocation, this court does not believe that such an effect can be characterized as an injury. *See Newman-Green*, 590 F.Supp. at 1088 n.7.

Rather, Jays' case depends on showing that consumers are injured because Frito-Lay's conduct was anti-competitive. The Federal Trade Commission has recognized, at least implicitly, that efforts to influence retail shelf space allocations are not in themselves anti-competitive. In *Kellogg Co.*, 99 F.T.C. 8 (1982), the Commission filed a complaint against manufacturers of ready-to-eat cereals. The complaint counsel alleged in part that the manufacturers had a tacit agreement among themselves to avoid competition for shelf space in retail stores, an unfair practice under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. 99 F.T.C. at 141-50. The ALJ concluded that

> the record does not support complaint counsel's assertion that respondents had a tacit agreement to avoid

> competition for shelf space in retail stores. Kellogg independently formulated a shelf space allocation plan that incorporated principles which were in accord with retailers' preferred methods of doing business. The other respondents, faced with the same requirements of retailers, responded with plans that incorporated the same basic principles. While each respondent competed for the most favorable shelf space location and the most space it could get, it was constrained not to push for more than a reasonable share in order to maintain rapport and credibility with retailers. Nevertheless, both General Mills and General Foods did present shelving alternatives in variations in an effort to gain competitive advantages.

99 F.T.C. 254.

Ultimately the complaint was dismissed. 99 F.T.C. at 269. In a separate statement Commissioner Clanton briefly discussed the shelf space allocation issues:

> It could be argued that an order restricting or preventing respondents from making shelf space recommendations would held to inject more competitive pressures into an important area of non-price competition, without intruding unnecessarily into respondent's day-to-day business judgments. On the other hand, this type of activity is undoubtedly normal commercial behavior that is engaged in by many other food manufacturers, although it is not clear whether the nature and pattern of recommendations in the cereal industry are followed in other markets.
>
> However, regardless of whether a workable remedy could be crafted on this subject, it is questionable whether the issue is at all important from a remedial standpoint.

99 F.T.C. at 277-78 (citing Schmalensee, *Entry Deterrence in the Ready-to-Eat Breakfast Cereal Industry*, 9 Bell J. Econ. 305, 307 n.4 (1978)).

Competition for shelf space does not appear to be an unusual phenomenon, and some of Frito-Lay's exhibits show that Jays used tactics similar to Frito-Lay's in trying to increase its own shelf space allocations. As *Kellogg Co.* suggests, there is no reason to assume that these efforts were anti-competitive. Jays contends that Frito-Lay's shelf space practices were anti-competitive because Jays and other potato chip companies were excluded from 7-Eleven stores. All that supports this contention, however, are certain internal memoranda from Frito-Lay. One document describes Frito-Lay's response to 7-Eleven's planned test-marketing of Frito-Lay's competitors' products (exh. 13). Another document is an enthusiastic letter to Frito-Lay salesmen, urging them to "[k]ick out our competition" (exh. 34). However, the letter does not mention 7-Eleven stores. A third document describes Frito-Lay's efforts to persuade 7-Eleven to eliminate plaintiff's products completely, leaving Frito-Lay as 7-Eleven's exclusive supplier (exh. 37).

The documents Jays relies on show that Frito-Lay is a hard-nosed, arguably over-zealous competitor. They do not, however, support the inference that Frito-Lay's shelf space practices were exclusionary. There is nothing in the record, for example, indicating that 7-Eleven was contractually bound to deal only with Frito-Lay, that Frito-Lay was able to coerce 7-Eleven into some sort of exclusive arrangement, or that Frito-Lay was otherwise able to prevent 7-Eleven from dealing with Frito-Lay's competitors. Moreover, Leonard Japp, Jr., a vice-president of Jays, testified on November 25, 1980 that the plaintiff was then supplying 7-Eleven and that some fifteen of its products were authorized in 7-Eleven stores. At the deposition, Mr. Japp explained that Jays had just been authorized to service 7-Eleven stores (Japp dep. at 410-12). The documents plaintiff relies on are dated at least several months before the deposition.

Without evidence that Frito-Lay's shelf space allocation practices were exclusionary, Jays' reliance on *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966) is misplaced. There the Supreme Court stated that the Federal Trade Commission had the power to declare an exclusive franchise program unfair without proof that its effect "may be to substantially lessen competition or tend to create a monopoly." 384 U.S. at 321. The Court held that the Commission had the power under section 5 of the FTC Act to arrest trade restraints in their incipiency, without proof that they amount to an outright violation of the antitrust laws. 384 U.S. at 322. In a brief opinion it reversed the Eighth Circuit Court of Appeals, which apparently reasoned that *Brown Shoe* could not have violated the FTC Act if it did not violate the antitrust laws.

Moreover, as the Fourth Circuit recognized in *Chuck's Feed & Seed Co. v. Ralston Purina Co.*, 810 F.2d 1289, 1292-96 & n.3 (4th Cir. 1987), *Brown Shoe* does not hold that exclusive dealing arrangements are inherently anti-competitive. The plaintiff in *Ralston Purina* was a retail feed store operator. Ralston Purina terminated the store operator's dealership after the operator began selling a competitor's product. The store operator sued under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-20, which is similar in material respects to the Illinois statute at issue here. The store operator contended that Ralston Purina's exclusive dealing policy was an unfair trade practice. The Court of Appeals reversed a jury verdict in favor of the store operator, holding that the district court should have granted Ralston Purina's motion for judgment notwithstanding the verdict. After reviewing the standards concerning exclusive dealing arrangements and other vertical restraints under the federal antitrust laws, the Court determined that

> [the store operator] simply failed to offer the relevant evidence concerning the extent to which Ralston Purina may have used exclusive dealing arrangements to "foreclose the market," or, in other words, to keep competing brands of feed out of a substantial percentage of the feed dealerships in the area. Instead, almost all of [the store operators] evidence related to his own individual experience with Ralston Purina. That alone is not enough to show a negative impact on competition in the market as a whole.

810 F.2d at 1295; *see Tampa Electric Co. v. Nashville Coal Co*, 365 U.S. 320 (1961); *Beltone Electronics Corp.*, 100 F.T.C. 68, 192-221 (1982); *see also, Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (rule of reason applies to vertical competitive restraints).

Thus, as *Ralston Purina* illustrates, even if Frito-Lay's practices were exclusionary to some degree, they were not necessarily anti-competitive. As the Court's earlier opinion suggests, plaintiff's evidence on that issue is too scanty to support the conclusion that they were. Rather than developing evidence bearing on the foreclosure of a significant amount of competition in some relevant market, plaintiff has focused on its own declining fortunes and asks this court to draw unwarranted inferences.

Jays argues that direct evidence of anti-competitive effects is unnecessary in light of their evidence of Frito-Lay's anti-competitive intentions and Frito-Lay's failure to act in a profit-maximizing fashion. This court has already observed that "[s]tanding by itself, Jays' intent evidence is wholly insufficient to establish Frito-Lay's predatory intent." 614 F.Supp. at 1073. No anti-competitive effects can be inferred from this evidence. Similarly, Frito-Lay's alleged failure to maximize profits in arranging its shelf space displays cannot itself establish a violation of the Consumer Fraud Act. *See Perrin v.*

Pioneer Nat'l Title Ins. Co., 83 Ill.App.3d 664, 672-63, 39 Ill.Dec. 124, 131, 404 N.E.2d 508, 515 (1st Dist. 1980) (giving bigger volume discounts than cost savings would justify is not actionable under the Consumer Fraud Act); *cf.* 614 F.Supp. at 1082, (citing *MCI Comm. Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1114 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (rejecting a profit maximization test for predatory pricing).

Moreover, Jays' contention that proof of anti-competitive effects is unnecessary where there is evidence of some anti-competitive purpose or lack of an independant business justification is based on a misreading of the *Du Pont* case. In *Du Pont*, a parallel pricing case, the Second Circuit rejected the FTC's position that non-collusive, non-predatory and independent conduct of a non-artificial nature could be unfair under Section 5 of the FTC act where it resulted in a substantial lessening of competition. 729 F.2d at 137. In vacating the FTC's order the Second Circuit stated that evidence of an anti-competitive purpose or lack of an independent business justification might substitute for proof of a tacit agreement, not that such evidence could substitute for proof of anti-competitive effects. 729 F.2d at 139-40. Finally, as courts have repeatedly observed, injury to a competitor is not the same thing as injury to competition. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Ball Memorial Hospital v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986); *Newman-Green*, 590 F.Supp. at 1087 & n.6.

Without evidence that Frito-Lay's shelf space activities were anti-competitive, Jays cannot establish the consumer injury element of its claim under the Consumer Fraud Act. For the same reason Jays cannot establish that Frito-Lay's non-deceptive shelf space practices were

unfair. If Jays were seeking injunctive relief, perhaps plaintiff nevertheless could proceed to trial under the Illinois Deceptive Trade Practices Act, Ill. Rev. Stat. ch. 121-1/2, ¶ 311 *et seq.*, on its claim that Frito-Lay deceived retailers by using incomplete data in its shelf allocation "mini-analysis" or by sabotaging retailers' own shelf-space studies. However, it cannot recover damages under the Deceptive Trade Practices Act. Under the circumstances, Frito-Lay is entitled to summary judgment.

CONCLUSION

Frito-Lay's motion for summary judgment is granted.

JAMES B. MORAN

JAMES B. MORAN
Judge, United States District Court

June 29, 1987.

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

JAYS FOODS, INC.

v.

CASE NUMBER: 78 C 4352

FRITO-LAY, INC.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That defendant's motion for summary judgment is granted. (See Memorandum and Order dated 6-29-87)

H. STUART CUMMINGHAM
Clerk

WILLIE A. HAYNES
Deputy Clerk

Date June 29, 1987